

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-1393

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee.

-against-

ERNEST DARWIN GOODLOE,

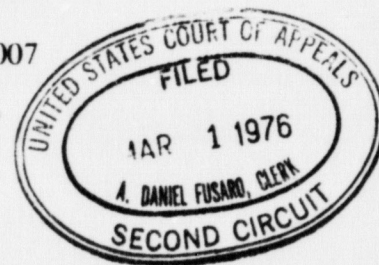
Appellant.

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*On Appeal From the United States
District Court For the Southern
District Of New York*

Appellant's Brief

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QUESTIONS PRESENTED

1. Whether appellant's guilt was proved beyond a reasonable doubt, permitting the denial of his motion for acquittal.
2. Whether the Court appropriately used as a basis for sentencing appellant its own determination that appellant had previously committed perjury before the Securities and Exchange Commission, which had never been charged nor proved.

PRELIMINARY STATEMENT

Ernest Darwin Goodloe appeals from a judgment of the United States District Court for the Southern District of New York, rendered December 2, 1975, convicting him after trial (Pollack, J. and a jury) of 53 counts of mail wire and securities fraud, and conspiracy to commit those violations, and sentencing him to concurrent indeterminate 5-year prison sentences.

The appellant is currently at liberty upon posting a surety bond of \$25,000, pending appeal.

STATEMENT OF FACTS

BACKGROUND

The factual allegations behind the charges in the indictment in this case are that the defendant Joseph Boyd and another James Joiner (an indicted defendant who pleaded guilty and testified on behalf of the government at the trial) attempted to locate a "Shell" corporation in December, 1969. A Shell by the name of Goldfield-Candelaria was located and purchased, and thereafter its name was changed to Select Enterprises, Inc. and stock was issued.

The offices and principals of the new business were Texas businessmen and professionals. Dr. Michael S. Knisely, a chiropractor from Texas and an old friend of Mr. Boyd, was President of the Corporation; Selwyn Webber, a Texas attorney, was Secretary. The Corporation commenced obtaining properties, largely in exchange for the Corporation's stock. A New Mexico mica mine was acquired from C. A. Morris and Company, a Corporation which was owned by the defendant Ernest D. Goodloe. Additionally, shares for oil and gas drilling rights in Texas were acquired. There was also an acquisition of land in California, and negotiations for an office building and a furniture factory were commenced.

The government's contention was that the properties acquired by Select Corporation were valueless and were intentionally and falsely certified to be worth millions of dollars by an accountant who was charged and acquitted, Wayne Barrett.

The government also contended that during the period when negotiations and acquisitions were taking place, a false market for the Corporation's stock was being made in New York by "wash sales" made by Corporation insiders buying and selling the stock to themselves through different brokers, and that the stock was then used as collateral to secure loans.

Of the approximately forty-one witnesses who testified for the government, only four related to the case as it relates directly to the appellant Ernest D. Goodloe.

Those witnesses were William Davidson and Hoyt Brinlee, two businessmen who exchanged California land for Select Corporation's stock; James Peterson, who was involved with Mr. Goodloe in the purchase of oil and gas leases in Texas; and Roy B. Goodloe, the appellant's brother, who worked at the New Mexico mica mines both before and after the transfer to Select, and who provided information concerning the value of the unmined minerals.

THE TESTIMONY

James Peterson was a 51-year-old man holding a bachelor's degree from the University of Texas, a master's degree from Harvard, and another master's degree from the University of Texas (1518)¹. On the day that he testified, Mr. Peterson was serving a 13-month prison sentence, resulting from a conviction for making false statements to medicare (1518).

Mr. Peterson's trial testimony centered around transactions with the appellant, Mr. Goodloe, involving oil and gas leases in Texas. In approximately September, 1969, Mr. Goodloe had an interest in an oil venture involving oil and gas leases for approximately 27,000 acres in Comanche County, Texas, called the "Southwest Duster Project" (1519-21; 1554). Mr. Goodloe wanted to sell a 50 % interest in the project for \$37,500 (1519-22). Peterson and his brother were to purchase the half-interest that was for sale, and there were several meetings with the Petersons, Mr. Goodloe, and with Robert Ford, an attorney.² After discussing questions concerning the title to the lands with the attorney, Mr. Ford, and after examining a valuation report by an appraiser named Joe Brown, and after meeting

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1. References are to pages of the trial transcript.
 2. Robert Ford was also indicted and convicted and is appealing his conviction separately.

with Mr. Brown to secure additional information and to have his questions answered, the Peterson brothers secured a bank loan and co-signed a promissory instrument together with Mr. Goodloe in November, 1969 (1521-26; 1557; Gvt. Exh. 163). Difficulties thereafter ensued between the Petersons on one side, and Goodloe on the other. Delays occurred at the well sites; additional funds were required; and questions concerning title and assignment of the leases arose. Finally, the Petersons asked for summaries and schedules detailing costs and rental delays which were furnished by Mr. Goodloe, as requested, (1526-29; Gvt. Exh's. 173, 174) but from January through June of 1970 no further money was expended by Mr. Peterson. His contention was that he received no assignments of the leases to which he claimed he was entitled (1529-32).

Roy B. Goodloe, the brother of the appellant Ernest Darwin Goodloe, also testified for the government. R. B. Goodloe supervised and worked in the mica mines that were transferred to Select by his brother since the mines were owned by C. A. Morris and Company, prior to Ed Goodloe's acquisition of them. R. B. Goodloe testified to the production at the mines, and the need for additional capital which prevented him from mining and processing large quantities of the mineral (1407-08; 1415).

Roy B. Goodloe also testified that it was he who provided the figures to Ed Goodloe in order to prepare the schedule of discovery

mineral values (1430, Gvt. Exh. 2B). That schedule was used as the basis for the valuations of the mica mines on Select's balance sheet, which showed the potential value at approximately \$19,000,000.

William Davidson, a 54-year-old financial consultant who had previously been convicted of perjury, testified that in 1969 and 1970 he lived in Phoenix, Arizona. He had been in the business of "real estate" and "investments", and was president of Ace Associates, a company consisting of himself and the corporation's secretary, Grant Kime (1138-41). Davidson testified that Ace obtained land in Imperial County, California, pursuant to an understanding with a Mr. Poochigian and Mr. Rodkin, two California residents doing business as "P & M Properties" (1141, 1156-57). Davidson and Kime were to sell the properties at "whatever price (they) could and would pay P & M between ten and thirty dollars per acre. Pursuant to the understanding, and after Davidson had seen the land, Ace received deeds from P & M without the requirement of paying for it until the land could be resold (1142, 1160, 1172). Additionally, in the course of dealings Mr. Davidson saw an appraisal for the land and was introduced to a man named Tom White, the preparer of the appraisal (1143; Gvt. Exh. 69, pp. 5-8). That land, according to Mr. Davidson's trial testimony, was deeded by Ace to underwriters investment (1144, Gvt. Exhs. 149-150).

In addition to the land already referred to, Ace Associates obtained an interest in other California land located in Riverside County; it was obtained by quitclaim deed from a Mr. Raci (1146; Gvt. Exh. 139).

Mr. Davidson testified that in February, 1970, on one or two occasions, he met a man named Ed Goodloe or Ernest Darwin Goodloe, but that he would not be able to recognize him if he saw him again. The witness was, in fact, unable to identify any defendant as being the man referred to (1148-49). The first time that they met, he testified, was at a meeting in a California hotel. In addition to Mr. Davidson and Mr. Goodloe, Mr. Brinlee and Mr. Kime were present (1148-49). Davidson had received calls from Mr. Brinlee and apparently the Imperial County Land was to be traded in return for stock of Select Enterprises, Inc. Brinlee and Kime showed them the land, and after negotiations a price was agreed upon, and a formal agreement was drawn by Brinlee (1149-51; Gvt. Exh. 151). The terms of the agreement included that in return for 50,000 shares of Select Enterprises stock, which was to be issued to Ace Associates within thirty days from February 21, 1970, Select would ultimately receive 100 sections of land located in Imperial County, California and valued at \$50 per acre, and additional parcels in Riverside County, California. The deeds from Ace, however, transferred title to Mr. Brinlee, not to Select (1151-52; Gvt. Exh. 138-A; 147A).

Mr. Davidson's company, Ace Associates, had marketable

title to convey and did so; moreover, Ace received the 50,000 shares of Select Stock in timely fashion, pursuant to the agreement (1153, 1167).

Mr. Davidson also testified that there subsequently came a time when he testified before the Securities and Exchange Commission. At that time he perjured himself when he denied that he had received any stock of Select Enterprises, and when he denied that he gave any deeds to Mr. Brinlee (1154-55). He was told before he testified for the government, however, that the statute of limitations covering that crime had already expired (1186-87).

Hoyt Brinlee, a 49-year-old Texan engaged in the precious metals business, admitted two previous convictions involving the passing of worthless checks (1186). He testified that he met Ernest Goodloe many times. The first time he met Mr. Goodloe, Brinlee testified, was in Dallas, Texas, at the office of a Mr. Ken Hester. Also present were a Mr. Garza and Mrs. Vinson (1187). Mr. Brinlee testified that at that time he was told by Goodloe of a new venture that was being formed. According to Mr. Brinlee's testimony, Goodloe told him that the other principals in the venture were Dr. Boyd and Mr. Joiner (1188). Brinlee was asked if he had any access to large portions of real estate and he responded by telling Mr. Goodloe that he could obtain land in California through an acquaintance of his (1188,

1231). From the very first meeting concerning the land, Brinlee was asked for an appraisal (1245).

After talking to Mr. Davidson and Mr. Kirne (the owners of Ace Associates) about the matter, Brinlee said that he met with Mrs. Vinson, Mr. Goodloe, and Mr. Hester at a coffee shop in Dallas, Texas. At the meeting he described the land in Imperial and Riverside Counties, California and quoted a price of \$50 per acre for the Riverside County land, and \$100 per acre for the Imperial County land payable in Select Enterprises stock (1189-1190). Brinlee and Vinson were to get \$20 from Davidson for each acre sold (1239).

After describing another meeting with Mr. Goodloe where a quotation of Select stock from a Dallas brokerage house was shown him, another meeting in Abilene, Texas was purportedly arranged to draw a closing contract and to make other arrangements for the closing of the contract. Once again Brinlee was asked for an appraisal which he said he did not have (1192-93).

The meeting in Abilene took place on February 17, 1970 in Robert Ford's office, with Mr. Davidson, Mrs. Vinson, Mr. Ford, his secretary, and Mr. Goodloe present (1194). Brinlee assured the others that he had good, clear title, and that he had quitclaim deeds from Ace (1195-96). At that meeting, Brinlee signed a

contract with Select (1196; Gvt. Exh. 69).

After that meeting, Brinlee testified that he flew to Los Angeles with Mr. Goodloe on February 20, 1970, and that the next day Brinlee, Davidson, Kime, and Goodloe flew over the lands in an airplane before making arrangements to "finalize" the deal (1199-1201). Brinlee testified that he could obtain title insurance; that he received the deeds from Davidson; and that he wrote out an agreement to pay Davidson (1201-02; Gvt. Exh. 138-A, 147-A, 151). Brinlee testified, however, that the written agreement did not represent the entire understanding between the parties. He said that in addition to the written terms, \$250,000 would be placed in escrow pending title clearance (1204).

Next, Brinlee testified that he met Ed Goodloe in Abilene on March 2, 1970. He said that he was told that the 50,000 shares of Select stock were ready for delivery to Davidson. The deeds were then discussed, and Mr. Ford (representing Select Enterprises) requested a warranty deed (1205). Brinlee testified that he told them that the only title that he could warrant was the title that he had received from Mr. Davidson "until such time as monies were available to clear the titles" (1205-06). At that point, he continued, he was told to "go ahead and sign the warranty deeds and place them

in escrow with Mr. Ford" (1206). Despite the absence of any escrow agreement, Mr. Brinlee signed four warranty deeds for the California property: two deeds granting parcels to Select Enterprises; one to Mr. Ford and one to Mr. Goodloe (1205-07; 1213-14; 1266; Gvt. Exhs. 156, 157, 133, 141). At that time, he was asked for appraisal again but claimed that he did not have the "financial means" to get one (1214).

Thereafter in the latter part of March, 1970, Brinlee testified that he, Mrs. Vinson, Mr. Goodloe, and several others met in Carrollton, Texas (1216). At that time, he was told that the faster he could furnish an appraisal for the land, the faster that the deal would be completed (1217-18). Brinlee suggested an Oklahoma appraiser whom he had heard of (1217). Eventually, Brinlee was told by Mr. Boyd that the title conveyed by Brinlee was not satisfactory (1222).

According to Mr. Brinlee's trial testimony, the two deeds signed by him granting eleven sections of the California property to Mr. Ford and Mr. Goodloe were executed by him on Mr. Goodloe's request, for "remuneration . . . for shepherding this transaction through the corporation" (1207). Later, when Brinlee testified before the Securities and Exchange Commission, he swore that he deeds were in payment for 20,000 shares of Select stock that he had received

from Mr. Goodloe (1224). His explanation for that at the trial was that Mr. Goodloe asked him to perjure himself prior to Brinlee's appearance at the Securities and Exchange Commission (1222-24). He further testified, at the trial, that a certificate for 10,000 shares of Select stock that had been given him by Goodloe was not made in payment for the land, but rather had been given to him by Goodloe to use as collateral to borrow money from banks, for himself and Goodloe (1218-19; Gvt. Exh. 153).

Despite the numerous meetings with Mr. Goodloe testified to by Mr. Brinlee, which according to his testimony included traveling from Texas to Los Angeles together as well as lengthy negotiations and transactions, when asked to identify Mr. Goodloe on direct examination by the government, Mr. Brinlee stated that he "would not recognize him" (1187). He also testified later that the transaction for the 11 sections of land for Goodloe and Ford was considered by him to be a separate transaction.

The government offered a balance sheet of Select Enterprises dated as of March 5, 1970, and certified to by W. Wayne Barnett, a Certified Public Accountant, who was charged in the instant indictment and acquitted. It showed the mineral discovery value of the mica mine combined with the oil and gas leases - transferred to Select by Mr. Goodloe in exchange for Select stock - valued at \$23,561,257.

As the notes for the financial statement indicated, the value of the oil and gas leases were confirmed by evaluations of a geologist, George D. Harris, and an independent oil and gas consultant, Joe Brown. Mr. Brown's report and evaluation was virtually unchallenged at the trial, and was received in evidence. The value of the mineral discovery values at the mica mine were provided by Roy B. Goodloe, who worked at the mines and who had taken the measurements and was familiar with the values of recoverable ore (R. B. Goodloe: 1430).

Robert Ford, an attorney admitted to practice for 26 1/2 years, testified on his own behalf (1767). He testified that Mr. Goodloe retained him in 1970 to represent him in connection with the sale of the oil and gas leases and the New Mexico mining property to Select Enterprises (1770). Mr. Ford drew the conveyances for the oil and gas leases (Exh. 36), and the assignments of the New Mexico mining interests (1771). Mr. Ford also testified that he rendered title opinions concerning the properties conveyed by Mr. Goodloe to Select (1773).

Concerning the California land sales by Brinlee to Select, Mr. Ford testified that it was upon his insistence that Brinlee conveyed to Select by warranty deeds instead of quitclaim deeds, and that he represented Mr. Goodloe in a separate transaction whereby Goodloe

traded Brinlee 60,000 shares of his own stock for 11 sections of the California land. Two of those sections were conveyed to Mr. Ford as payment for legal services (1781, 1783-84, 1789). Mr. Ford also personally was shown the California land and testified to the chain of title (1805, 1814).

Wayne Barnett, the acquitted accountant, testified that he prepared Select's financial statements. He personally examined appraisal reports for the two properties conveyed by Goodloe, and that he -- Barnett -- was personally acquainted with the reputations of each; their reputations were good in the area, and local banks accepted their appraisals to grant loans (2069-78). Those reports were offered and received by the government (Exhs. 163 and 164). Those reports were the bases provided to Mr. Barnett by Mr. Goodloe, as the substantiation for values placed on the financial statements of Select by Mr. Barnett.

POINT I

ERNEST GOODLOE'S GUILT WAS NOT PROVED
BEYOND A REASONABLE DOUBT. DEFENDANT'S
MOTION FOR ACQUITTAL WAS IMPROPERLY DENIED.

The appellant Ernest Goodloe was never an officer of Select Enterprises, or its predecessor, "Shell" Goldfield-Candelaria Incorporated. Nor was there any testimony, evidence, or allegation that Mr. Goodloe was involved in any way in the creation of the market for Select Stock, or in its trading upon the over-the-counter market.

Essentially, the case against Mr. Goodloe was based on the allegation that he transferred the mica mines and the oil and gas leases into Select, and that he assumed a principal role in overstating their value on Select's financial statements. Mr. Goodloe never denied transferring the assets into the Corporation. The transfer was an arms-length transaction for which Mr. Goodloe received 66,667 shares of Select stock in return. Moreover, Mr. Goodloe took no part in the preparation of Select's financial statements which were concededly prepared and certified by Wayne Barnett, a Certified Public Accountant. In its balance sheet dated March 5, 1970, which was certified by Mr. Barnett, the Certified Public Accountant, Select Enterprises valued the combined mineral discovery value of the oil and gas leases as well as the mica mines, at \$23,561,257.00. In the Notes attached to the balance sheet and which by reference were made a

part of that financial statement, Mr. Barnett indicated that the

"mineral discovery values were confirmed by evaluations of Mr. George D. Harris, a geologist and Mr. Joe Brown, an independent oil and gas consultant."

Additionally, the balance sheet noted that there was no pipeline connection at the oil and gas property and that additional expenditures were required by Select Enterprises, Inc. in order for the mining property to be ready for operation.

Both the report of George D. Harris and of Joe Brown were offered in evidence by the prosecution and their substance were not contradicted. Even Mr. Peterson, who testified that he did not necessarily agree with Mr. Brown's conclusions, testified that he discussed the matter with Mr. Brown, that an additional report was prepared by Brown, and that Mr. Brown answered all of his questions.

The prosecution also introduced into evidence a pro-forma balance sheet of C. A. Morris and Company, Inc., dated January 20, 1970, prepared by Mr. Barnett. C. A. Morris was the corporation, owned by Mr. Goodloe and others, which was the owner of the mica mines prior to the transfer to Select Enterprises, Inc. That statement had annexed to it a Schedule of Discovery Mineral Values showing the location and condition of minerals at the mine and the "net discovery

value", i. e., the estimated value of the minerals after being extracted, less the cost of mining, milling, and selling. Moreover, the testimony of R. B. Goodloe and of Wayne Barnett indicated that the mineral discovery values of the mica mines were provided to the appellant by R. B. Goodloe, and that even if overstated or incorrect were not attributable to Ernest Goodloe. That Schedule was prepared by the appellant, confirmed by Geologists Harris and Ford, cost estimates furnished by Parker from production records, but based upon figures furnished to him by Parker Goodloe, the government's witness who had been at the site and had worked at the mine for a number of years, and confirmed by geologists' reports.

Nor did the testimony of Mr. Davidson or Mr. Brinlee establish that Mr. Goodloe took a willing part in any criminal transaction as charged in the indictment. Essentially, they testified that they negotiated a sale of land in Imperial and Riverside Counties, California, to Select Enterprises. They indicated that Mr. Goodloe acted on behalf of Select, Inc., and that Robert Ford was the attorney for Select Enterprises, Inc. It turned out that the land sold by Brinlee and Davidson was desert land and was partially non-existent; but rather than any showing of criminality or fraud on the part of appellant, it showed fraud and deception on Brinlee's and Davidson's part -- the sellers. At worst, as far as Mr. Goodloe was

concerned, it showed reliance on an attorney, Robert Ford, who examined the titles, and opined that the titles were in order. Peterson's testimony -- even if believed -- related to a civilly contested matter which did not relate to the charges on trial.

Under all of the evidence as presented at the trial, it is clear that Mr. Goodloe committed no crime in connection with his activities with Select Enterprises. He sold property in return for the Corporation's lettered stock, and, at most, he attempted to help the fledgling corporation acquire land which appeared to have great potential value.

The motion for acquittal was improperly denied.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION
IN BASING THE SENTENCE OF APPELLANT UPON
THE COURT'S INAPPROPRIATE DETERMINATION
THAT APPELLANT HAD COMMITTED PERJURY
AT AN EARLIER TIME BEFORE THE SECURITIES
AND EXCHANGE COMMISSION.

The appellant, Ernest Darwin Goodloe, was sentenced to five-year concurrent sentences on each of the counts upon which he was convicted. The Court abused its discretion in sentencing by taking into account factors which were unreliable, unsubstantiated, and apparently incorrect. Although it is true that a sentencing Court has wide discretion in determining the sentence to be imposed upon an individual and in determining sentence the Court may properly draw upon a wide variety of information -- regardless of its source -- there are limits to the Court's discretion which require appellate review and which may necessitate resentencing. United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 ().

Various courts have dealt with the question of whether or not a trial court may, in sentencing a convicted individual, consider uncharged perjury apparently committed by the defendant. Invariably the issue is presented in the context of a defendant who testifies on his own behalf at his trial, and in the sentencing Judge's presence, and who is disbelieved by the jury as expressed in its guilty verdict, and by the

court. The rule as to whether such perjury may be utilized as a basis for increasing sentence differs in the various Circuits. (See, for example, Scott v. United States, 419 F. 2d 264 (U.S. App. D. C. 1969, holding that it is impermissible); United States v. Moore, 484 F. 2d 1284, 1287 (4th Cir. 1973, holding that it is permissible).

This Court has ruled in United States v. Hendrix, 505 F. 2d 1233 (1974), that if a defendant testifies at his trial, the Court may treat such perjury as an adverse sentencing factor if he is persuaded beyond a reasonable doubt that the defendant committed it. United States v. Hendrix, supra, at p. 1236. Short of that, however, false testimony should normally be bypassed for sentencing purposes and left to the United States Attorney for prosecution. United States v. Hendrix, supra, at pp. 1231-37; United States v. Moore, supra, at p. 1288.

In the instant case the defendant did not testify on his own behalf nor did he present any witnesses. The Trial Court in this case did not have the opportunity to actually see and hear the witnesses, or even to consider his testimony with respect to the issues presented at the trial. The Securities and Exchange Commission proceeding in which the defendant testified involved issues different -- albeit related -- to those at the trial. Moreover, the transcript of that testimony, which

was admitted in evidence, contains no clear or patent perjury by appellant. Nevertheless, in announcing the factors upon which he based his sentence decision, the Court said the appellant had perjured himself before the Securities and Exchange Commission (minutes of sentence, 12/2/75, p. 5). Therefore, the standards enunciated in United States v. Hendrix, supra, were not met in the instant case, and the appellant's sentence was improperly increased.

CONCLUSION

For the reasons stated above, and for the reasons stated in the briefs and arguments of co-counsel which we join when applicable to the appellant, Ernest Darwin Goodloe, the Judgment being appealed from should be reversed.

Respectfully submitted,

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March, 1976

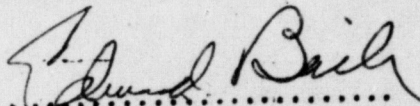
STOKAMER

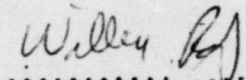
AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 1 day of March, 1976 at No. 1 St. Andrews Pl. NYC deponent served the within Brief upon U.S. Atty. So. Dist. of N.Y. the Appellee herein, by delivering true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 1 day of March 1976


.....
Edward Bailey


.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0192945
Qualified in Richmond County
Commission Expires March 30, 1976